

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

v.

Maritza Montoya-Samaniego,

Defendant.

No. CR-05-768 TUC DCB (JM)

**REPORT AND  
RECOMMENDATION**

This matter was referred to Magistrate Judge Marshall for all pretrial matters. A Motion to Suppress Pursuant to Fourth Amendment [Doc. No. 17] filed by Defendant Maritza Montoya-Samaniego ("Montoya-Samaniego") on July 27, 2005, was heard by Magistrate Judge Marshall on August 26 and September 1, 2005. Montoya-Samaniego was present at the hearing and was represented by counsel. Two witnesses were presented by the Government: U.S. Border Patrol Agent Gerald Wilke and U.S. Drug Enforcement Agent Brian Miers. Four witnesses were presented by Montoya-Samaniego: Louie Tartaglia, Jr., a school teacher in Douglas, Arizona; Javier Madrid, a manager for Federal Express in Sierra Vista, Arizona; and private investigators Andrew Sowards and Randy Downer. The witnesses were examined, cross-examined, and questioned by the Court. Having considered the matter, the Magistrate Judge submits the following Findings of Fact and Conclusions of Law and recommends that Defendant Montoya-Samaniego's Motion to Suppress be denied.

**I. FINDINGS OF FACT**

On March 19, 2005, the date of Defendant's stop and arrest, agents from the United States Border Patrol set-up check points on State Route 90, just north of Sierra

1 Vista/Huachuca City, Arizona, and on State Route 80, just north of Tombstone, Arizona.  
2 (TR1:9-10).<sup>1</sup> Border Patrol also set up a high intensity traffic interdiction ("HIT") zone just  
3 to the west of McNeal, Arizona, near the intersection of Frontier Road and Davis Road.<sup>2</sup>  
4 (TR1:17, 21). HIT zones are areas that Border Patrol has identified as having "a high amount  
5 of illegal aliens and narcotic trafficking." In areas that are designated HIT zones, Agents set-  
6 up signs indicating that it is a HIT zone and assign "agents to observe traffic and interdict  
7 illegal traffic . . . ." (TR1:20).

8 In an effort to interdict anybody that might try to circumvent the HIT zone at Davis  
9 and Frontier Roads, Agent Wilke took up a position at the intersection of Central Highway  
10 and Davis Road, just east of the HIT zone. (TR1:22-23). Central Highway begins at State  
11 Route 80 about ½ mile north of the U.S./Mexico border and runs north/south beginning just  
12 west of Douglas, Arizona. (TR1:13; Exhibit 1). The road, beginning at its most southern  
13 point and going north for approximately six miles, is dirt and is surrounded by farm and  
14 ranch land. (TR1:16, 29). The road then becomes paved and continues north for  
15 approximately 9 miles. (TR1:17). At approximately 1:00 p.m. on March 19, Agent Wilke,  
16 who was in a marked Border Patrol SUV, parked at the northeast corner of the intersection  
17 facing southbound. (TR1:24). Agent Wilke described the traffic on Davis as "medium," and  
18 the traffic on Central as "fairly light." (TR1:27).

19 At approximately 1:51 p.m. that day, Agent Wilke was still parked at the intersection  
20 and "observed a vehicle driven by a female pass by [the] location," and "appeared to be  
21 following another darker colored pickup truck." (TR1:27, 29). The vehicles approached the  
22 intersection from the south and, upon reaching the four-way stop at the intersection, turned  
23 eastbound on Davis Road. (TR1:30). Agent Wilke did not notice anything that stood out

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25 <sup>1</sup>"TR1" refers to the Transcript of Hearing on Motion to Suppress dated August 26, 2005,  
26 and filed with the Clerk on August 31, 2005. "TR2" refers to the Transcript of Motion Hearing  
dated September 1, 2005, and filed with the Clerk on September 9, 2005.

27 <sup>2</sup>Davis Road begins just east of McNeal, Arizona, where it intersects State Route 191, and  
28 ends at State Route 80 south of Tombstone, Arizona. (TR1:17).

1 about the truck; however, "many things" stood out about the second vehicle, which he  
2 described as a "mid-size sedan." (TR1:32, 41). Agent Wilke noted the direction from which  
3 it was coming (from the border) and the direction it was heading (toward State Route 91 and  
4 away from the border). (TR1:32). As the vehicle passed him, the driver did not look at or  
5 waive to Agent Wilke and she appeared nervous. (TR1:33; TR2:7). Based on the first letter  
6 of the license plate, Agent Wilke believed that the car was recently registered. (TR1:34-38).  
7 The vehicle appeared to be heavily weighted despite only carrying one passenger. (TR1:40;  
8 TR2:9-11). The rear bumper appeared to be "lower to the road than it . . . should have been  
9 for just one person in the vehicle . . . ." (TR1:40).

10 Agent Wilke then pulled in behind the vehicle and observed it for a short distance  
11 while considering what he had noticed. (TR1:42). Based on the factors, he decided to stop  
12 the vehicle, believing that "it could possibly be carrying some cargo, . . . either aliens or  
13 narcotics." (TR1:41). He performed the stop just west of State Route 191 on Davis Road,  
14 approximately a mile east of Central Highway. (TR1:42). Subsequently, 253.95 pounds of  
15 marijuana was found in the vehicle's trunk. (TR1:42).

## 16 **II. CONCLUSIONS OF LAW**

17 Montoya-Samaniego moves to suppress the evidence seized following the unlawful  
18 stop of the vehicle she was driving, alleging that reasonable suspicion did not exist to  
19 support a lawful stop. The Fourth Amendment protects the right of the people to be secure  
20 in their person, houses, papers, and effects against unreasonable searches and seizures. *U.S.*  
21 *v. Hensley*, 469 U.S. 221, 226 (1985). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme  
22 Court held that, consistent with the Fourth Amendment, police may stop persons in the  
23 absence of probable cause under limited circumstances. The Court has held that law  
24 enforcement agents may briefly stop a moving automobile to investigate a reasonable  
25 suspicion that its occupants are involved in criminal activity. *Hensley*, 469 U.S. at 226.

26 Reasonable suspicion exists when an officer is aware of specific articulable facts, that,  
27 together with rational inferences drawn from them, reasonably warrant a suspicion that the  
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1 person to be detained has committed or is about to commit a crime. *United States v. Cortez*,  
 2 449 U.S. 411, 416-18 (1981). When assessing the reasonableness of the police officer's  
 3 actions, the court must consider the totality of the circumstances confronting the officer at  
 4 the time of the stop. *United States v. Sokolow*, 490 U.S. 1, 8 (1989). The articulable facts  
 5 forming the basis of a reasonable suspicion must be measured against an objective  
 6 reasonableness standard, not by the subjective impressions of a particular officer. *Gonzalez-*  
 7 *Rivera v. INS*, 22 F.3d 1441, 1445 (9<sup>th</sup> Cir. 1994).

8 In this case, the court must ascertain whether the factors cited as giving rise to the stop  
 9 describe "behavior that should excite the suspicion of a trained border patrol agent that  
 10 criminal activity is afoot." *United States v. Rodriquez*, 976 F.2d 592, 594 (9<sup>th</sup> Cir. 1992).  
 11 Agent Wilke identified seven factors which he considered in making the decision to stop the  
 12 Defendant's car:

- 13 1. The driver was a young female who appeared stiff, avoided eye contact with  
 14 the agent and did not acknowledge his presence (TR1:33);
- 15 2. The vehicle appeared to be traveling in tandem with another truck (TR1:30-  
 16 31);
- 17 3. The stop was made just before the 3:00 p.m. shift-change (TR1:25-26);
- 18 4. The stop occurred near the border in an area notorious for drug smuggling and  
 19 the care was traveling away from the border (TR1:39);
- 20 5. The car was traveling on a dirt road in a rural area where the majority of  
 21 vehicles were trucks and SUVs driven by area ranchers (TR1:28);
- 22 6. The vehicle was an older model that was only recently registered (TR1:34-38);
- 23 7. The rear of the car was riding low (TR1:40; TR2:9-11).

24 The Government asserts that the Defendant's failure to make eye contact may be  
 25 considered as a factor establishing reasonable suspicion. On this issue, the Ninth Circuit has  
 26 noted "whether the contact is suspicious or not is highly subjective and must be evaluated in  
 27 light of the circumstances of each case." *United States v. Montero-Camargo*, 208 F.3d 1122,  
 28 1136 (9<sup>th</sup> Cir. 2000) (en banc) (citation omitted); *see also Gonzalez-Rivera v. Immigration*  
*& Naturalization Service*, 22 F.3d 1441, 1446 (9<sup>th</sup> Cir.1994) (concluding that giving weight

1 to this factor would "put the officers in a classic 'heads I win, tails you lose' position and the  
2 driver, of course, can only lose.") (quoting *United States v. Lopez*, 564 F.2d 710, 712 (5th  
3 Cir.1977)). Here, the factor carries no weight. Louie Tartaglia, a former law enforcement  
4 officer and teacher of law enforcement careers at Douglas High School, testified that he does  
5 not waive or acknowledge agents when he sees them in the area. (TR2:36-37). Likewise,  
6 Javier Madrid, who lives in the area, when asked if he ever acknowledged the presence of  
7 Border Patrol Agents, stated, "Not really." (TR2:48). Even Agent Wilke recognized that  
8 drivers do not always look at agents when they pass their location. (TR2:7). Given the  
9 uniformity of this testimony, Montoya-Samaniego, by failing to acknowledge Agent Wilke,  
10 did nothing that could properly be considered in support of a finding of reasonable suspicion.

11 The second factor, that the vehicle appeared to be traveling in tandem with another  
12 truck, is also not persuasive in this case. While this factor can be a valid consideration, it is  
13 not entitled to consideration in this case. *United States v. Sharpe*, 470 U.S. 675, 682 n. 3  
14 (1985) (vehicles traveling in tandem for 20 miles a factor supporting reasonable suspicion);  
15 *Montero-Camargo*, 208 F.3d at 1139; *see also United States v. Robert L.*, 874 F.2d 701, 704  
16 (9th Cir.1989) ("This circuit has recognized that traveling in tandem can be indicative of  
17 illegal smuggling activity."). The evidence here establishes that Agent Wilke did not see the  
18 vehicles traveling any substantial distance together. The only evidence of tandem driving  
19 is that both vehicles turned right when they reached Davis Road. The Court does not believe  
20 this factor warrants suspicion of criminal activity.

21 The Government's argument that the stop occurred near the time of a shift change also  
22 is not persuasive in this case. Agent Wilke testified that he first saw the Defendant's vehicle  
23 at approximately 1:51 p.m., one hour and nine minutes prior to the 3:00 p.m shift change.  
24 (TR1:25, 27). Agent Wilke also testified that an increase in illegal activity occurred during  
25 the 90 minutes before and after shift changes. (TR1:25). However, the Court finds that, at  
26 least in this case, extending the window of presumed increased illegal activity beyond one-  
27 hour both before and after a shift change is excessive. The travel time from Davis Road to  
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1 the Border Patrol station is approximately 25 to 30 minutes. (TR1:70-71). Thus, allowing  
2 a one-hour window both before and after the shift change, agents have a 30 to 35 minute  
3 cushion between the time of the stop and the time they would need to leave the area in order  
4 to return to the Border Patrol station by the 3:00 p.m. shift change. As shift change times are  
5 generally known by smugglers and are not overlapping or staggered (TR1:70, 72), the  
6 Government has offered no rationale or documentary evidence to support the contention that  
7 the period of increased illegal activity should extend beyond the two-hour period surrounding  
8 the shift change.<sup>3</sup> As such, the Court finds no reason to extend the period beyond one-hour,  
9 a time frame which is consistent with other reported decisions on the issue. *See, e.g., United*  
10 *States v. Arvizu*, 534 U.S. 266, 269 (suspicious activity occurred approximately 45 minutes  
11 before 3:00 shift change); *Franco-Munoz*, 952 F.2d at 1056 (stop occurred approximately 45  
12 minutes after the 4:00 p.m. shift change).

13 Factor four, the time of encounter and the proximity to the border, although wholly  
14 innocent standing alone, can support a finding of reasonable suspicion when considered with  
15 other factors. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975)  
16 (identifying vehicle type and proximity to the border as factors in evaluating reasonable  
17 suspicion); *United States v. Franco-Munoz*, 952 F.2d 1055, 1057 (9<sup>th</sup> Cir. 1991) ("the facts  
18 used to establish 'reasonable suspicion' need not be inconsistent with innocence.")*overruled*  
19 *in part on other grounds by United States v. Montero-Camargo*, 208 F.3d 1122, 1130 (9<sup>th</sup>  
20 Cir. 2000). Here, the Defendant's vehicle was traveling approximately fifteen or sixteen  
21 miles north of the international border. This was a fair and reasonable consideration in  
22 making the stop. *See United States v. Diaz Juarez*, 299 F.3d 1138, 1140 (9<sup>th</sup> Cir. 2002)  
23 (suspect vehicle traveling five miles from border).

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25 <sup>3</sup>Given that three shift changes occur during a 24-hour period, allowing one hour before and  
26 after shift changes results in six of those 24 hours being considered periods of increased activity.  
27 The addition of 30 minutes both before and after a shift change would increase the period from six  
28 hours, or 1/4 of each day, to nine hours, or over 1/3 of the day. At that point, this factor, at least  
under the facts of this case, reaches the point at which the suspicious activity can be so remote from  
the shift change that it is no longer compelling.

1 The fifth factor cited by Agent Wilke, that the car was traveling from a dirt section  
2 of Central Highway that is abutted by ranches and farms, and was not the type of vehicle  
3 usually traveling on that part of the road, is a reasonable consideration. The agent's  
4 testimony on this point was corroborated by Javier Madrid, a witness called by the defense,  
5 who testified that he lives near Central Highway and described the types of vehicles usually  
6 seen on the road:

7 I would say trucks, the majority I'd say, ranchers, farmers, the  
8 local people in the area. That's what I would say, mostly. That's  
what you need to live out in that area.

9 (TR2:47). As such, this is another factor, albeit not dispositive, that Agent Wilke could  
10 reasonably consider. *See United States v. Ramirez-Lujan*, 976 F.2d 930 (5<sup>th</sup> Cir. 1992),  
11 *discussed in, United States v. Greene*, 826 F.Supp. 314 (D.Ariz. 1993) (traveling on an  
12 infrequently traveled unpaved or country road a factor supporting reasonable suspicion).

13 The sixth factor articulated by the Government is that the vehicle was an older model  
14 and, based on the license plate number, was only recently registered. The defense presented  
15 testimony suggesting that the first letter of the license plate was not necessarily indicative of  
16 when the vehicle was registered. (TR2:40-43). Nevertheless, Agent Wilke believed that the  
17 first letter on the license plate of the Defendant's vehicle was indicative of recent registration.  
18 There is no evidence that his belief was not in good faith and such a premise, whether  
19 accurate or not, can support reasonable suspicion. *United States v. Garcia-Acuna*, 175 F.3d  
20 1143, 1147 (9<sup>th</sup> Cir. 1999) (an erroneous license plate report, relied upon in good faith, may  
21 support founded suspicion). As such, this consideration was a proper factor cited in support  
22 of the stop.

23 The seventh and final factor that decidedly tips the scale in the Government's favor  
24 is the fact that the vehicle was riding low. Agent Wilke was unequivocal in his testimony  
25 on this point. Moreover, the defense investigators examined the vehicle and concluded that  
26 the combined weight of the driver and the marijuana load would have resulted in the car  
27 riding approximately 1 7/8 inches lower than when it was not loaded. (TR2:115). As  
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1 depicted in the photographs taken by the investigator, the reduction in space between the tire  
2 and wheel well when the car was weighted is noticeable. *Compare* Exhibit 7 with Exhibit  
3 9. This factor is one that the Ninth Circuit has found significant in justifying an investigatory  
4 stop, *United States v. Franco-Munoz*, 952 F.2d 1055, 1057 (9<sup>th</sup> Cir.1991), and it is given  
5 great weight here. It is the one factor that most clearly supports a reasonable inference that  
6 the Defendant was involved in criminal activity.

7       Considering all the factors found reasonable– the proximity of the stop to the border,  
8 the type of vehicle and where it was traveling, the recent registration, and, in particular, that  
9 the vehicle was riding low – the court finds that sufficient articulable facts have been  
10 established to meet the reasonable suspicion test. *See Montero-Camargo*, 208 F.3d at 1130  
11 (conduct entirely innocuous when viewed in isolation may justify stop if considered with  
12 other information or surrounding circumstances "tend to indicate criminal activity has  
13 occurred or is about to take place."); *Brignoni-Ponce*, 422 U.S. at 885 ("in all situations, the  
14 officer is entitled to assess the facts in light of his experience in detecting illegal entry and  
15 smuggling.").

### 16 **III. RECOMMENDATION FOR DISPOSITION BY THE DISTRICT JUDGE**

17       Based on the foregoing and pursuant to 28 U.S.C. § 636(b) and Local Rule 1.17(d)(2),  
18 Rules of Practice of the United States District Court, District of Arizona, the Magistrate  
19 Judge recommends that the District Court, after an independent review of the record, **DENY**  
20 Defendant Maritza Montoya-Samaniego's Motion to Suppress [Docket No. 17].

21       Pursuant to 28 U.S.C. §636(b), any party may serve and file written objections within  
22 10 days after being served with a copy of this Report and Recommendation. If objections  
23 are not timely filed they may be deemed waived. The parties are advised that any objections  
24 filed are to be identified with the following case number: **CR 05-768-TUC-DCB**.

25       DATED this 23<sup>rd</sup> day of September, 2005.

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28       Jacqueline Marshall  
United States Magistrate Judge